90-488

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

MICHAEL ARVIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Law Offices Of
CHARLES R. GARRY
By CHARLES R. GARRY
1256 Market Street
San Francisco, CA 94102
(415) 864-3131

Attorney for Petitioner
MICHAEL ARVIN

QUESTIONS PRESENTED

I.

Whether Petitioner was denied the due process of law in his prosecution under 18 U.S.C. Section 2252 (a) by being denied the use of material evidence and expert testimony concerning the question of engaging in sexually explicit conduct as an essential element of the offense.

II.

Whether Petitioner was denied his right to free expression under the First Amendment in his prosecution under 18 U.S.C. Section 2252 (a) by being denied the defense of expert testimony about community standards, prurient interest, and serious literary, artistic, scientific or education value.

III.

Whether Petitioner was denied the due process of law in his prosecution under 18 U.S.C. Section 2252 (a) because the jury instructions were misleading and inadequate in that they failed to contain proper guidance as to the essential elements of the offense; that the jury was precluded from reaching the statutory imperatives of the offense; and that the jury was inadequately instructed as to the relevance and weight of the various factors concerning lasciviousness.

IV.

Whether the sentence imposed upon Petitioner is violative of Amendment VIII, U. S. Constitution, because of being disproportionate to his offense.

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The Petitioner, Michael Arvin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this case on April 12, 1990.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit filed an opinion and order April 12, 1990, affirming Petitioner's conviction and sentence for violation of 18 U.S.C. Section 2252(a)(1). The opinion of the Court of Appeals is attached herein in the Appendix at pages A-1 - A-16. An order denying rehearing entered on June 25, 1990. A copy of said order is attached hereto at the Appendix, page A-17. On July 9, 1990, the Ninth Circuit entered an Order staying the mandate for 30 days, conditioned upon the filing of the instant Petition within that time. F.R.A.P. 41(b), Appendix p. A-18.

JURISDICTION

Petitioner was convicted on two counts for violation of 18 U.S.C. Section 2252(a)(1) on April 8, 1987. On July 21,

1987, he was sentenced to the custody of the Attorney General for three years in prison and three years probation following imprisonment. His convictions and sentence were affirmed by the Ninth Circuit Court of Appeals on April 12, 1990. Petitioner's request for rehearing was denied on June 25, 1990. Jurisdiction of this Court arises under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the First, Fifth, and Eighth Amendments to the United States Constitution. (See Appendix at page A-19.)

STATUTES INVOLVED

This case involves 18 U.S.C. Section 2252(a)(1), 18 U.S.C. Section 2255 (1) & (2)(E), copies of which are attached hereto in the Appendix at pages A-19.

STATEMENT OF THE CASE[1]

A. Statement Of The Proceedings

On August 22, 1986, Michael M. Arvin was charged with two counts of violation of 18 U.S.C. Section 2252(a)(1). [ER: 1]. A motion to dismiss the indictment was filed on December 31, 1986, and was heard and denied on February 6, 1987 [ER: 3-5]. On April 6, 1987, jury trial began [RT: 1-34]. On April 8, 1987, Michael Arvin was convicted by the jury of both counts upon which he was indicted [RT: 3-139]. On July 21, 1987, Mr. Arvin was sentenced to the custody of the Attorney General for three years in prison for Count I, and he was placed on probation for three years following release from

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[1] Figures in brackets preceded by RT refer to Reporter's Transcript on Appeal, figures preceded by ER refer to Excerpts of Record, unless clearly indicated otherwise.

custody in Count I with conditions [ER: 40-45].

B. **Statement Of Facts**

Michael M. Arvin is a 44 year old man who has worked for the California Department of Transportation for over 17 years. His record as an employee is outstanding and exemplary. He was married for fourteen years until that marriage ended in divorce in October 1981. He continues to have a close and warm relationship with his former wife. The marriage, however, was tormented by Mr. Arvin's addiction to alcohol and marijuana, as well as Mr. Arvin's abnormally low sex drive. Mr. Arvin's last alcoholic drink was on June 30, 1981, and his last marijuana cigarette was on July 31, 1982. He has been and he continues to be a member of Alcoholics Anonymous.

Before the time of the facts giving rise to the present Indictment, Mr. Arvin's only previous convictions were for drunk driving, once in 1964 and once in 1981.

Mr. Arvin has been medically diagnosed as suffering from Klinefelter's Syndrome, a condition caused by a genetic chromosome defect; and it is a condition which results in symptoms of a small penis, small testes, and sterility. Since February 1983, Mr. Arvin was treated for this condition by receiving varying doses of Testosterone Enanthate as prescribed by his physician. Testosterone Enanthate is a hormone treatment which increases the sex drive and makes a person more assertive.

Since he was a teenager, Mr. Arvin has had homosexual tendencies which were, for the most part, suppressed. In his

earlier years, he suppressed these homosexual tendencies because of his religious Catholic upbringing, which taught that homosexuality is a mortal sin for which Hellfire is the punishment. In later years, and especially after his divorce in 1981, he developed a dreadful fear of Acquired Immune Deficiency Syndrome (AIDS). His fear of AIDS caused him to suppress his homosexual tendencies even more so than had his religious background.

However, when his sex drive increased because of the Testosterone treatment in 1983, he became totally unable to curtail his homosexual needs. The conflict between those needs and his dreaded fear of AIDS caused him to fantasize having "safe" sex with a heterosexual male.

Jeff Miller, a Los Gatos undercover police officer, placed an advertisement in the April 4, 1986, issue of Swinger's Digest. The advertisement said: "Ped-Pal wanted. Ped seeks letters/photos from anyone with like interests. Will trade or buy pics...". During his marriage in (1974 or 1975), Michael Arvin had acquired a movie and several magazines which were pedophile oriented. He did so in order to use the material for fantasy thoughts while making love to his wife. He thought that it would help him to overcome the impotence caused by Klinefelter's Syndrome.

Mr. Arvin saw the advertisement placed by undercover police officer Miller. When he read it, it triggered his memory of the movie and magazines he had acquired. More importantly, it triggered a thought: he believed that

usually pedophiles are heterosexual. He fantasized sexually arousing the person who had placed the advertisement, and completing his fantasy by orally copulating that person. This, he thought, would be "safe" sex with a man. On April 23, 1986, (postmarked April 26, 1986), Mr. Arvin began to correspond with undercover police officer Jeff Miller ("Miller"). He enclosed a photocopy photograph which, it was alleged, formed the basis for the charge in Count II of the Indictment. Miller responded to Mr. Arvin's letter. On May 6, 1986, Mr. Arvin sent another letter to Miller, this time he enclosed two photocopy photographs which were alleged to form the basis for the charge in Count I of the Indictment.

Mr. Arvin and Miller exchanged approximately four other letters, none of

which contained any original or photocopy photographs. Mr. Arvin wrote to Miller that he had certain photographs which lawfully could not be mailed. The ones he did send to Miller he believed were not unlawful. The two men expressed a mutual desire to meet. Eventually, Miller enticed Mr. Arvin to meet with him at a motel in Los Gatos on July 2, 1986.

At their meeting on July 2, 1986, each man had a different agenda. Mr. Arvin hoped to arouse Miller sexually with photographs he brought to the meeting, and then to perform fellatio on Miller. Miller came to the meeting prepared and determined to arrest Mr. Arvin. During a two hour meeting, only police officer Miller's agenda was fulfilled. Mr. Arvin made no sexual advances toward Miller. Miller arrested Mr. Arvin.

When arrested, Mr. Arvin, an avid hunter, was found to have a gun in his pocket. He had, also, a recorder which he used to tape his meeting with Miller. He carried the gun because of his apprehension about meeting with Miller, a stranger. He has a serious medical condition of Glaucoma, and he feared that if he was hit on the head, he could be blinded.

The Santa Clara County District Attorney brought criminal charges against Mr. Arvin for his conduct in relation to the above-described events. Mr. Arvin pled guilty and nolle contendere to the various charges in the Santa Clara County Judicial District Municipal Court. He was placed on probation for a period of three years; received a sentence of six months in the County Jail, all but forty-five days of which was suspended; was

ordered to pay a fine; and was ordered to participate in psychiatric or another therapeutic program as prescribed by his probation officer.

As noted above, Mr. Arvin stopped having Testosterone treatment after his arrest on July 2, 1986. In addition, he has continued going to meetings of Alcoholics Anonymous, and he has had, and he is having, psychological therapy.

Before trial, Mr. Arvin had indicated he intended to introduce expert testimony with respect to whether or not the photographs were lascivious. The trial judge granted the government's In Limine Motion to preclude introduction of expert testimony by Mr. Arvin. [ER: 6].

Jury instructions concerning the definition of lascivious were submitted by Mr. Arvin and were rejected by the Court [ER: 32]. Instead, the trial judge

gave a definition of lascivious to the jury in his own words [ER: 22].

I.

EXPERT TESTIMONY

Petitioner Arvin asserts that expert testimony was critical to his defense. The continued exclusion of this testimony is a denial of his due process rights. The foundation of his right to expert testimony is based primarily upon two arguments. The first is premised in the statutory construction of 18 U.S.C. Section 2252(a)(1)(A) which states in part "...the use of a minor engaging in sexually explicit conduct...". The other rests upon the relevance of community standards, prurient interest and significant value in establishing First Amendment protection.

A. **The Canon Of Plain Meaning**

The Appellate Court partly based its affirmation of the District Court's refusal to allow expert testimony on the notion that it "...would not have been directed at any legally relevant factors..."[2] The Appeals Court rejected Arvin's claim that lasciviousness includes the factor of "the child...actually engaging in sexual conduct...".[3]

Petitioner insists that any definitional test of lasciviousness must at the very least include the element of "...a minor actually engaging in sexually explicit conduct" (i.e. a lascivious exhibition of the genitals.) Statutory construction would make it mandatory.

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[2] Slip opinion United States v. Arvin, #87-1220, p. 3687 (1990).

[3] Ibid.

"We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 109 (1980).[4]

In 1978, Congress passed the original protection of children legislation.[5] The Joint Committee of Conferees, which met to finalize the act,

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[4] See also Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 221 (op. O'Connor), 236 (op. of Powell, Jr.) (1985); Dombrowski v. Pfister, 380 U.S. 479, 491 n.7 (1964); Bouie v. City of Columbia, 378 U.S. 347, 362 (1963); INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (Scalia concurring) (1986).

[5] The "Protection of Children Against Sexual Exploitation Act of 1977", P.L. 95-225.

stated "It is the intent of the conference committee that if a minor has engaged in this sexually explicit conduct and there was a production of material...that persons who mail...such material are liable...".[6]

A further review of the legislative purpose would support the inference that Congress intended the "Child Protection Act of 1984" to end the "...national tragedy...of children...filmed or photographed while engaging in sexually explicit acts...".[7]

At that time, Congress relied upon the Supreme Court decision in New York v.

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[6] Ibid., 1978 U.S. Code Cong. and Admin. News, Legislative History P.L. 95-225, pp. 40-71, p. 71.

[7] 1984 U.S. Code Cong. and Admin. News pp. 492-511, The "Child Protection Act of 1984", P.L. 98-292, p. 492.

Ferber[8] to amend the law.[9] The Court had granted certiorari "presenting the single question:

> To prevent the abuse of children who are made to engage in sexual conduct...could the legislature...prohibit the dissemination of material which shows children engaged in sexual conduct..."[10]

It would appear then that Arvin's reading of 18 U.S.C. Section 2252(a)(1)(A) in requiring the element of "engaging in" is within the plain meaning of the statute.

The Appeals Court rejected this premise justifying its holding with another Ninth Circuit opinion, United States v. Dost, 636 F.Supp. 828, 832 (S.D.Cal. 1986). The Appellate Court

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[8] 458 U.S. 747 (1982)

[9] 1984 U.S. Code Cong. pp. 492-494.

[10] Ferber, p. 753.

would attempt to define lascivious as not requiring a finding of the "minor engaging in sexual conduct". But should such a result prevail it would subject Arvin to an 'ex post facto statutory construction which fails to provide fair warning. "We have long held that in such situations the statute as construed may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendants."[11]

Arvin contends thac the application of a construction which is contrary to both the plain meaning of the statute and the intent of the legislature could not possibly provide fair warning. Expressio unius est exclusio alterius.

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[11] Slip opinion Massachusetts v. Oakes, #87-1651, p. 7 (1989); quoting Dombrowski v. Pfister, 380 U.S. 479, 491, n. 7 (1964).

Using the Appeal Court's own logic that "legally relevant factors" were an appropriate subject for expert testimony[12] Arvin should have been allowed his expert witness defense.

B. Violation Of First Amendment

The Appeals Court ruled as irrelevant any proffered expert testimony about "community standards"[13], "prurient interest", and "patent offensiveness."[14] The Court argued that such testimony is relevant as a First Amendment defense only as it pertains to obscenity. "(U)nder Ferber, child pornography can be prohibited even if not obscene."[15]

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[12] Slip opinion United States v. Arvin, #87-1220, p. 3687 (1990).

[13] Ibid., p. 3689.

[14] Ibid. -- Arvin has never raised the issue of patent offensiveness in his expert witness argument.

[15] Ibid., p. 3689.

Arvin agrees with the Appeals Court reading of Ferber that child pornography is separate from obscenity, he does not agree that they are wholly unrelated. For what else is the Ferber standard, if not the scion of obscenity law? "The test for child pornography is separate from the obscenity standard enunciated in Miller, but may be compared to it for the purpose of clarity. The Miller formulation is adjusted in the following respects:"[16]

As to prurient interest, the Miller decision said, "the basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work taken as a whole

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[16] Ferber, p. 764.

appeals to the prurient interest...".[17]

But Ferber modified the Miller formulation by stating "[a] trier of fact need not find that the material appeals to the prurient interest of the average person; ...and the material at issue need not be considered as a whole."[18]

Thus the Miller formulation reread as per the Ferber modification would be that "the trier of fact applying contemporary community standards would find that the material at issue appeals to the prurient interest."[19] As such the legally relevant factors of community standards and prurient interest are

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[17] Miller v. California, 413 U.S. 15, 24 (1973).

[18] Ferber, p. 764.

[19] For another adjustment to the Ferber standard, see United States v. Reedy, 632 F.Supp. 1415, 1421 (W.D. Okl. 1986).

apparent[20] and therefore expert testimony is appropriate.[21]

The Appeals Court also found that expert testimony as to material equivalence or significant value as irrelevant and said Ferber "...also holds that scientific or other value will not necessarily save a photo from legitimate

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[20] The degree to which prurient interest operates as an evidentiary test in weighing First Amendment protection remains imprecise. Its relevance appears to be retained in Ferber's modification of the Miller test. For unlike patent offensiveness it was not totally excised as an element. (Ferber p. 764).

In addition, further reference to prurient interest appears in the Court's recent decision in Osborne v. Ohio. "Thus, the only conduct prohibited by the statute is conduct which is not morally innocent, i.e...for prurient purposes." United States slip opinion #88-5986, p. 8, fn. 10 (1990).

[21] Smith v. California, 361 U.S. 147, 164-165 (1959) "the defense should be free to introduce appropriate expert testimony." Justice Frankfurter.

prohibition."[22] As to whether the materials at issue had sufficient value to save them from prohibition and thereby place them under the aegis of First Amendment protection was an issue in dispute.

Arvin maintains that his right to claim First Amendment protection is inextricably bound with his right to proffer expert testimony as to the significance of the "...scientific and other value"[23] of the materials at issue.

II.

JURY INSTRUCTIONS

Petitioner maintains the Appeals Court was in error in refusing to find that jury instructions were misleading and inadequate. The instructions were

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[22] United States v. Arvin, p. 3688.

[23] Ibid.

defective in at least three ways. First, the instructions failed to contain any guidance as to an essential element of the offense; i.e. whether or not a minor was actually engaging in sexually explicit conduct. Second, the instructions usurped the jury's role as to a finding of fact in the statutory imperatives, thereby improperly shifting the burden of proof to the defense. Finally, there was manifest error in both the definitional elements and dynamics used to describe what constituted lasciviousness.

A. Essential Element

The Appellate Court argued that "instructions are to be viewed as a whole, in the context of the entire trial"[24] to determine adequacy. A review

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[24] Ibid., p. 3689.

of the trial record including pretrial motions shows that petitioner Arvin in his offer of proof and proposed jury instructions argued for the inclusion of the essential element of "engaging in" as part of the plain meaning of the statute. The complete absence of such an instruction renders the totality inadequate. The Appeals Court relied upon United States v. Pazsint, 703 F.2d 420, 424 (9th Cir. 1983) to determine adequacy of jury instruction. But a reading of Pazsint shows that where "...the instructions erroneously described the offense...[A] conviction should not rest on ambiguous and equivocal instructions to the jury on a basic issue." (citations omitted)[25]

B. Burden Of Proof

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[25] United States v. Pazsint, p. 424.

The Appeals Court established as a given that the District Court must tell "the jurors that they must find the statutory imperatives."[26] More specifically, the Appeals Court said, "[i]n formulating an instruction defining 'sexually explicit conduct' under Section 2256(2)(E) (sic), the Court of course must instruct the jury that it must find that the pictures visually depict the minor's genitals or pubic area. This is a threshold element contained in the language of Section 2256(2)(E) (sic) itself, distinct from the additional requirement that the depiction be 'lascivious'".[27]

However, a review of the jury instructions shows that the District

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[26] United States v. Arvin, p. 3692.

[27] Ibid., p. 3691.

Court never allowed the jury to reach these dispositive elements on its own. The District Court usurped the jury function as the trier of fact. Quoting the District Court:

> "[T]he elements of the offense break down into the following:
>
> Number one is a knowing mailing...
>
> Second, a visual depiction. [T]he pictures in this case are obviously visual depictions.
>
> Third, the use of a minor...
>
> And finally, fourth element...is the lascivious exhibition of the genitals or pubic areas.
>
> [W]hen you see the photographs, it is obvious that they do involve the genitals and pubic area."[28]

The District Court prejudged the threshold element of the offense. "These mandatory directions directly foreclosed

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[28] Ibid., p. 3690 n. 4.

jury consideration of whether the facts proved established certain elements of the offenses...The instructions also relieved the [Government] of its burden of proof articulated in Winship, namely proving by evidence every essential element of...crime beyond a reasonable doubt."[29]

As this error was not raised by Arvin at the time of the trial, its timeliness is in question. However, Pazsint states that "...Although [not] timely objected to...instructions as a whole may be reviewed here because of plain error."[30] Arvin also asserts that since the matter of threshold elements was initially raised by the Appeals Court in its affirming opinion, it is a proper

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[29] Slip opinion, Carella v. California, #87-6997, p.3 (1989).

[30] Pazsint, p. 424.

issue to be discussed now.

C. **Lasciviousness**

The Appeals Court presents a forceful though specious argument that "...the jurors were told about as well as any jurors could be what they should consider in making a determination as to whether the pictures were lascivious."[31]

The strength of the argument rests in the premise that as the jury would have viewed "these instructions as a whole [they] were proper instructions."[32]

It is in the justifications, however, that the weakness of the arguments is revealed. For example, the Appellate Court felt it important to note that "[t]he judge in this case gave a long list of specific factors that had

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[31] United States v. Arvin, p. 3692.

[32] Ibid.

been present in other child pornography cases to guide the jury's viewing."[33]

In the Appellate Court's view "[t]he judge guarded against the jury's attaching undue significance to any particular factor."[34] This was purportedly accomplished by the instruction that "the weight or lack of weight which you give to any one of those factors is for you to decide."[35]

Put another way the judge supposedly avoided the jury's placing too great an emphasis on any one factor by allowing it to decide how much emphasis it wished to place on any one factor. The contradiction and illogic of this so-called limiting factor is apparent.

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[33] Ibid.

[34] Ibid.

[35] Ibid.

The Appellate Court challenged Petitioner's assertion that the instructions as to weight supra allowed the jury to fix upon one or two instructions that might be insufficient in themselves. It is a plausible premise that "[a] reasonable juror could not have interpreted the instructions to allow a guilty verdict from a single fact...for example nudity or suggestive captions on the pictures."[36]

But the Appellate Court fails to illustrate where the reasonable juror would have found these limiting parameters. For example, as to factor "number four: whether the child was clothed or nude."[37] Petitioner in his offers of proof and proposed jury

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[36] Ibid.

[37] Ibid., p. 3690, n.4.

instructions pointed out that at least with regard to nudity it was not sufficient by itself and a cautioning limitation as to weight placed upon this factor should have been given. As a further example, Petitioner questioned how captions added after the photographs of the live performance could be evidence of sexual conduct.

In neither instance did the District Court address these concerns or modify the instructions. The Appellate Court also seemed to dismiss the importance of them.

However, could not a reasonable juror have reached a finding of lasciviousness based upon a photograph of a nude child and suggestive caption attached? Would this not be more possible if the nudity was affixed with a caption which might be "more than

distasteful and more than bad taste?"[38] The Appellate Court could point to nothing in the jury instructions which might prevent such manifest error.

Petitioner Arvin offered two decisions which would indicate that a jury reaching a verdict of guilty upon only the factors of nudity and the captions would be against the law. In Osborne v. Ohio[39] the Court has reiterated its position in Ferber. "We have stated that depictions of nudity, without more, constitute protected expression."[40]

With regard to the captions, per se, the court in Ferber states, "We note that the distribution of descriptions or other depictions of sexual conduct, not

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[38] Ibid., p. 3692.

[39] Osborne v. Ohio, slip opinion #88-5986, p. 7.

[40] Ibid., p. 7.

otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[41]

The First Amendment status of depictions other than live performances of minors which may or may not be a relevant part of the material at issue is "an important question of federal law which has not been, but should be settled by this Court...".[42]

As this question is an essential element or at least a factor in Petitioner's case, it has a direct bearing on the outcome of the case.

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[41] Ferber, p. 765.

[42] Rules of the Supreme Court, Rule 10.1(c).

III.

DEFENDANT WAS DENIED DUE PROCESS OF LAW, EQUAL PROTECTION OF THE LAWS AND HAS SUFFERED A CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF AMENDMENTS V AND VIII OF THE UNITED STATES CONSTITUTION, BECAUSE THE SENTENCE IMPOSED UPON HIM IS DISPROPORTIONATE TO THE OFFENSE COMMITTED BY HIM

Petitioner was convicted of violating 18 U.S.C. Section 2252(a)(1), mailing materials involving the sexual exploitation of minors. Under the Statute, he could have received a maximum penalty of 10 years imprisonment and/or a fine of $250,000, and a special assessment of $50.

The sentence imposed is within the limits of the punishment provided by law. That is, he received a sentence of three years in prison on Count I and a suspended sentence on Count II. His three year prison sentence was to be followed

by three years' probation. The Ninth Circuit did not address this issue in its opinion.

Because the Statute seemingly authorizes the sentence imposed, at first blush the Eighth Amendment is not violated. However, under the facts of this case Rummell v. Estelle, Jr., 445 U.S. 263, 63 L.Ed.2d 382 (1980), and Solem v. Helm, 463 U.S. 277, 77 Law Ed.2d 637 (1983), support an attack on the sentence made because it is disproportionate to Mr. Arvin's crimes.

The theory of disproportionality has been reviewed and written about by the Supreme Court in Solem v. Helm, supra.

> "The constitutional principal of proportionality has been recognized explicitly in this Court for almost a century. In the leading case of Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), the defendant had been convicted of falsifying a

public document and sentenced to 15 years of '*cadena temporal*,' a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted that 'it is a precept of justice that punishment for crime should be graduate and proportioned to offense,' and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, and determined that the sentence before it was 'cruel in its excess of imprisonment,' as well as in its shackles and restrictions.

The Court next applied the principle to invalidate a criminal sentence in *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). A 90-day sentence was found to be excessive for the crime of being 'addicted to the use of narcotics.' The Court explained that 'imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual.' Thus there was no question of an inherently barbaric punishment. 'But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a

common cold.'

"Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. [Citations omitted.] And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. [Citations omitted.]

"There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences. The constitutional language itself suggests no exception for imprisonment. We have recognized that the Eighth Amendment imposes 'parallel limitations' on bail, fines, and other punishment, Ingraham v. Wright, 430 U.S. 651, 667, 97 S.Ct. 1401, 1410, 51 L.Ed.2d 711 (1977), and the test is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support

> for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See Hodges v. Humkin, 2 Bulst. 139, 40 Eng.Rep. 1015 (K.B. 1615). And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis."
>
> Solem v. Helm, 463 U.S. 290, 3007, 3009. 103 S.Ct. 3001 (1983) [citations and footnotes omitted.]

The Statute with which Mr. Arvin was convicted of violating is, of course, a serious crime. It is serious because society considers it to be serious, and Congress has said so. Yet Mr. Arvin's role and conduct in violating the statute is a direct result of physical impairment and psychological impediment. Moreover, the real thrust of 18 U.S.C. Section 2252(a)(1) is directed primarily at persons who produce kiddie-porn for commercial purposes. Mr. Arvin did not

do so. Mr. Arvin responded to an advertisement placed by a police officer. He mailed to that police officer photographs several years old and which photographs were produced in a foreign country where it was legal to do so. In addition, Mr. Arvin suffers from serious sexual deficiencies. Finally, Mr. Arvin has no previous criminal record.

What is especially demonstrative of the disproportionality of the punishment imposed against Mr. Arvin is a sentence imposed upon another defendant charged with the same offense, in the Northern District of California in the case of United States v. Thomas Christian, Northern District of California, No. CR-369 TEH. Mr. Christian received a sentence of probation despite the fact that he produced at least 188 photographs of "prepubescent and older oriental males

depicted in sexually exploitative photographs." In addition, when Mr. Christian was released on bail he continued to attempt to deal commercially in kiddie-porn.

The Court should bear in mind, as well, that Mr. Arvin was charged in State Court with offenses relating to the conduct involved in the present prosecution. The State Court imposed the most minimum sentence of three years probation and six months in the county jail all of which was suspended with the exception of 45 days. He was also ordered to participate in psychiatric or another form of therapeutic program prescribed by his probation officer. The sentence imposed in the present case interferes with the necessary treatment Mr. Arvin is undertaking pursuant to the State Court sentence.

The trial judge in Mr. Arvin's case felt that he was doing a favor to Mr. Arvin by imposing the sentence he did. He felt that by sentencing Mr. Arvin to prison for three years and by recommending a prison camp environment, he was arranging for Mr. Arvin to have psychiatric and psychological therapy.

The fact is there is no reasonable psychiatric therapy which could be obtained in a prison environment. Certainly, there is no such therapy program available at Lompoc Federal Prison Camp. Mr. Arvin's physical condition cannot be cured in a federal prison camp.

Sentencing practices have frequently made courts to be the laughing stock of this country because of the disparity in sentencing, and because of irrational sentences imposed which are either

absurdly extreme or absurdly light. The comparison of this case involving Mr. Arvin with that of the Christian case, shows that there is no reason for ending the disrespect with which courts are held because of sentencing practices.

If courts mean what they say when they hold disproportionate sentences to be constitutionally infirm, this is a case where such a principle should be applied.

It is astounding that the Ninth Circuit chose to ignore this issue.

CONCLUSION

For all of the reasons stated above it is respectfully asked that a Writ of

Certiorari be issued to the United States Circuit of Appeals for the Ninth Circuit.

DATED: September ____, 1990

Respectfully submitted,

CHARLES R. GARRY
Attorney for Petitioner,
MICHAEL ARVIN

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MICHAEL ARVIN,

Defendant-Appellant.

_____/

NO. 87-1220

D.C. No. CR-86-0752-CAL

OPINION

Appeal from the

United States District Court For the Northern District of California

Charles A. Legge, District Judge, Presiding

Argued and Submitted December 12, 1988 San Francisco, California

Before: Betty B. Fletcher, Robert R. Beezer and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Fletcher

SUMMARY

Criminal Law/Criminal Procedure

Affirming the district court's judgment of conviction, the court of appeals held that a depiction of a minor need not be obscene to satisfy the definition of "sexually explicit conduct" under the "lascivious exhibition of the genitals or pubic area" prong of 18 U.S.C. Section 2256(2).

Appellant Michael Arvin stipulated at trial that he knowingly mailed three photocopied photographs of nude female children to undercover agent Jeffrey Miller. Arvin was not the photographer nor did he seek financial compensation from Miller. Because of Arvin's stipulation, the prosecution's case consisted of little more than

introducing the pictures into evidence. Arvin offered no affirmative defenses, and the jury found Arvin guilty of both counts of the indictment under 18 U.S.C. Section 2252(a)(1). Arvin appealed.

[1] The constitutional limitations on the regulation of child pornography were first spelled out in New York v. Ferber, 458 U.S. 747 (1982), which held that pornographic depictions of children lack First Amendment protection even if the depictions are not "obscene." [2] Arvin argued that the district court erred in refusing to dismiss the indictment, contending that since he had no commercial motivation, the statute could not constitutionally or by its terms apply to him. This argument lacks merit in light of the amendment to section 2252 eliminating the commercial purpose requirement, and in light of

Ferber's recognition of broad legislative authority to regulate child pornography as necessary to prevent child abuse.

[3] Arvin also argued that he was deprived of a fair trial by not being allowed to present expert testimony on the issue of whether the pictures were lascivious. [4] However, the Ninth Circuit has held that lascivious is a commonsensical term and that whether a given photo is lascivious is a question of fact and a determination that lay persons can and should make. Because the jury was fully capable of making its own determination on this issue, the expert testimony was properly excluded.

[5] Arvin contended that the trial court wrongly instructed the jury on the legal definition of lascivious. [6] The distinction between a pornographic

depiction and an innocent one is a distinction the jury should be able to make from its own experience. How much instruction should be given beyond telling the jurors that they must find the statutory imperatives and must use their common sense to decide whether the pictures are lascivious is essentially up to the discretion of the judge. In this case, the judge gave a long list of specific factors that had been present in other child pornography cases to guide the jurors' viewing. The judge guarded against the jury's attaching undue significance to any particular factor. The judge conveyed to the jury that lascivious was like lewd and that it was more than distasteful and more than bad taste. The court concluded that the jury was properly instructed. The jurors were told about as well as

any jury could be what they should consider in determining whether the pictures at issue were lascivious.

COUNSEL

Charles R. Garry, San Francisco California, for the defendant-appellant.

Sanford Svetcov, Assistant United States Attorney, San Francisco, California, for the plaintiff-appellee.

OPINION

FLETCHER, Circuit Judge:

Michael Arvin appeals his conviction and sentence under 18 U.S.C. Section 2252(a)(1) for mailing three photographs of minor females engaged in sexually explicit conduct. His appeal presents several issues revolving around the meaning of the statutory term

"lascivious." We must decide whether this term incorporates a standard of obscenity, whether expert testimony on the issue of "lasciviousness" should have been allowed, and whether the district court correctly instructed the jury on the definition of this term. Arvin also raises issues concerning the denial of his motion to dismiss the indictment, the severity of his sentence, and prosecutorial misconduct. We affirm.

FACTS

Arvin stipulated at trial that he knowingly mailed three photocopied photographs of nude female children to undercover officer Jeffrey Miller. Arvin mailed the pictures in response to an advertisement seeking a pedophile correspondent placed by Miller in

Swinger's Digest. The photocopies were of pictures he had purchased several years earlier. Arvin was not the photographer, nor did he seek financial compensation from Miller. All three pictures show apparently prepubescent girls completely nude, facing the camera with their legs apart so as to expose their genitals. The pictures were captioned "Lolita-Sex," "Skoleborn-School Children," and "Little Girls F____k too."

A two-count indictment[1] was returned on August 22, 1986. Arvin's motion to dismiss the indictment was denied on February 6, 1987. The government's motion in limine to exclude expert witnesses on the question of

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[1] Count I covered the picture received by Miller on April 26, 1986, Count II the two pictures received on May 6, 1986.

whether the pictures were "lascivious" was granted on March 13, 1987. Jury trial began on April 6, 1987. Because Arvin stipulated that he knowingly mailed the photocopies, the prosecution's case consisted of little more than introducing the pictures into evidence. Arvin raised no affirmative defenses. The jury found Arvin guilty on both counts, and the court sentenced him to three years imprisonment, to be followed by three years probation.

18 U.S.C. Section 2252(a) punishes:

> Any person who ... knowingly ... mails any visual depiction, if --
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual

depiction is of such conduct...

18 U.S.C. Section 2256(1) defines a "minor" as "any person under the age of eighteen years." Section 2256(2) defines "sexually explicit conduct" to include various specific sexual activities not depicted in any of Arvin's pictures, as well as the "lascivious exhibition of the genitals or pubic area of any person." "Lascivious" is not defined.

ANALYSIS

I. Background

[1] The constitutional limitations on the regulation of child pornography were first spelled out in New York v. Ferber, 458 U.S. 747 (1982). Ferber held that pornographic depiction of children lack First Amendment protection even if the depictions were not "obscene." Unlike obscenity laws, which aim to protect "the sensibilities of unwilling recipients," Miller v. California, 413 U.S. 15, 18-19 (1973), child pornography laws aim to protect the children from sexual exploitation and abuse. Ferber, at 757. Therefore, "community standard," "redeeming value," and "prurient interest" tests are not relevant in determining what constitutes child pornography:

[T]he question under the

Miller test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production... "It is irrelevant to the child [who has been abused] whether or not the material...has a literary, artistic, political or social value."...It would be equally unrealistic to

equate a community's toleration for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation.

Ferber, at 761 & n.12 (citations omitted). Ferber recognizes a broad power in legislatures to prohibit nude depictions of minors as needed to prevent child abuse.

After the decision in Ferber, Congress amended the federal child pornography laws in several ways.[2] The

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[2] As originally enacted, 18 U.S.C. Section 2252(a) provided in part:

Any person who --

(1) knowingly transports or ships in interstate or foreign commerce or mails, for the purpose of sale, any obscene visual or print medium, if __

mailing no longer must be for commercial purposes. The depictions need not be obscene. The age of majority was raised from 16 to 18. Most importantly for this case, Congress replaced the term "lewd" with "lascivious" in Section 2256(2)(E), noting:

> "Lewd" has in the past been equated with "obscene"; this

> (A) the producing of such visual or print medium involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual or print medium depicts such conduct;...

18 U.S.C. Section 2253(1) defined a minor as "any person under the age of sixteen years." Section 2252(2)(E) included "lewd exhibition of the genitals or pubic area of any person" within the definition of "sexually explicit conduct." Protection of Children Against Sexual Exploitation Act, P.L. 95-225, 92 Stat. 7 (1977).

> change is thus intended to make it clear that an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful.

Remarks of Senator Specter, 130 Cong. Rec. S3510, S3511, March 30, 1984, quoted in United States v. Dost, 636 F.Supp. 828, 831 (S.D. Cal. 1986). The constitutionality of this change, as against a vagueness challenge, was upheld in United States v. Wiegand, 812 F.2d 1239, 1243 (9th Cir.) (affirming Dost), cert. denied, 484 U.S. 856 (1987); see also United States v. Freeman, 808 F.2d 1290, 1292 (8th Cir.), cert. denied, 480 U.S. 922 (1987); United States v. Rubio, 834 F.2d 442,

447-48 (5th Cir. 1987).[3]

II. Arvin's Motion to Dismiss the Indictment

[2] Arvin argues that the district court erred in refusing to dismiss the indictment. This motion turned on the district court's legal interpretation of the statute and therefore is reviewed de novo. Cf. United States v. Smith, 795

---

[3] The court in Wiegand stated that "'[l]ascivious' is no different in its meaning than 'lewd,' a commonsensical term whose constitutionality was specifically upheld in Miller v. California, and in Ferber." 812 F.2d at 1243 (citations omitted). This language was intended only to demonstrate that the two terms are essentially interchangeable in ordinary usage. Although the above-quoted language in Wiegand is certainly subject to the interpretation that we were implicitly rejecting Congressional intent and mandating the continued use of the obscenity standard, such an interpretation is not required by the actual holding of Wiegand, which was only that the term "lascivious" is not unconstitutionally vague.

F.2d 841, 845 (9th Cir. 1986), cert. denied, 109 S.Ct. 512 (1988). Arvin presents a two-pronged argument. First, he contends that since he had no commercial motivation, the statute could not constitutionally or by its terms apply to him. This argument lacks merit in light of the amendment to Section 2252 eliminating the "commercial purpose" requirement, and in light of Ferber's recognition of broad legislative authority to regulate child pornography as necessary to prevent child abuse. Nor does the defendant have to be engaged in distribution; even a mailing of photographs to a developer, for purely personal use, will suffice for conviction. United States v. Smith, 795 F.2d at 845-46.

Arvin's second argument is that the photos were not "lascivious" as a matter

of law. We reject this characterization of the pictures. While it is arguable that the pictures are not, in fact, lascivious, the district court did not err in refusing to dismiss the indictment on this basis. The issue of lasciviousness was properly allowed to go to the jury.

III. Expert Testimony

[3] Arvin argues that he was deprived of a fair trial by not being allowed to present expert testimony on the issue of whether the pictures were lascivious. The admissibility or exclusion of expert testimony is within the discretion of the trial court, and is reversible only for abuse of discretion or manifest error. United States v. Langford, 802 F.2d 1176, 1179-80 (9th Cir. 1986) (although expert

testimony concerning eyewitness identification is often useful, its exclusion is within the discretion of the trial court), cert. denied, 483 U.S. 1008 (1987). The benchmark for exclusion is whether the proffered testimony would usurp the function of the jury. Id.

Arvin makes two arguments. First, he argues that the evidence should have been admitted under Fed. R. Evid. 702. Second, he contends that the evidence should have been admitted to avoid a violation of the First Amendment.

Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of act to understand the evidence or to determine a fact in issue a witness qualified as an expert

by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Rule by its own terms merely allows the use of expert testimony ("may testify"). "Whether the situation is a proper one for the use of testimony is to be determined on the basis of assisting the trier." Advisory Committee Note to Rule 702; see also United States v. Christopher, 833 F.2d 1296, 1299 (9th Cir. 1987) (whether jury will receive "appreciable help" from the expert testimony).

Arvin argues that experts would have appreciably assisted the jury here because (1) child pornography is "highly emotional and provocative," and juries are invariably "highly biased"; (2)

there is a "lack of public understanding and knowledge of matters affecting sexual behavior"; and (3) the jury should be able to compare other nude photographs of children, with expert guidance. The experts would discuss "appropriate" places and poses where a child could be depicted nude without the depiction being lascivious.

We disagree. The expert testimony either would not have been directed at any legally relevant factors or would have impinged on the jury's function. According to Arvin's offer of proof, the experts would have testified that a photo is not lascivious unless the child is showing a willingness to engage in sexual conduct, actually engaging in sexual conduct, or demonstrating an erotic reaction. This is simply wrong, see Dost, 636 F.Supp. at 832, and its

introduction would usurp the jury's function. They would have testified that there is a difference between "nudity" and "nakedness". That there is a difference seems unlikely but, in any event, is legally irrelevant to any issue in this case. They also would have testified that "nudity" is not the same as "sexual activity." One does not need an expert to attest to the truth of that proposition. These words to which Arvin would have experts testify are within common understanding. The jury does not need the help of experts.

They also would have testified that photos not unlike those mailed by Arvin are used for educational purposes. However, Ferber expressly holds that community tolerance for equivalent material is irrelevant; it also holds that scientific or other value will not

necessarily save a photo from legitimate prohibition. 458 U.S. at 761 & n.12. Finally, the experts would have testified that the fact that someone may be sexually aroused by the photos does not necessarily make them lascivious. That may be so, but the fact that the photos have that effect may nonetheless be relevant. Wiegand described a picture prohibited by the statute as one in which "a child's sex organs [are] displayed lasciviously -- that is so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur." Wiegand at 1244. The statute reflects a legislative determination that it is a form of child abuse for a photographer to pose a child sexually for purposes of the photographer's sexual gratification, and that the abuse continues with

dissemination of the photos for purposes of satisfying others. Thus, the apparent motive of the photographer and intended response of the viewer are relevant.

[4] This circuit has held that "lascivious" is a "commonsensical term", Wiegand at 1243, and that whether a given photo is lascivious is a question of fact. Id. at 1244. There is a consensus among the courts that whether the item to be judged is lewd, lascivious, or obscene is a determination that lay persons can and should make. See United States v. Thoma, 726 F.2d 1191, 1200 (7th Cir.) cert. denied, 467 U.S. 1228 (1984); United States v. Thomas, 613 F.2d 787, 794 (10th Cir.) cert. denied, 449 U.S. 888 (1980); United States v. Cutting, 538 F.2d 835, 840 (9th Cir. 1976) (en

banc) ("female nudes so posed that a jury could quickly find that the sole purpose was to emphasize a lewd portrayal of the genitals."), cert. denied, 429 U.S. 1052 (1977); United States v. Nemuras, 567 F.Supp. 87, 90 (D. Md. 1983), aff'd, 740 F.2d 286 (4th Cir. 1984). Because the jury was fully capable of making its own determination on the issue of "lasciviousness," the district court did not abuse its discretion in excluding the expert testimony.

Arvin also argues that expert testimony about "community standards", prurient interest", and "patent offensiveness" would have assisted the jury in avoiding a conviction in violation of the First Amendment. If to be lascivious, an exhibition must be obscene, this testimony would of course

be relevant. However, under Ferber, child pornography can be prohibited even if not obscene. Accordingly, such testimony is irrelevant in this case.

IV. Prosecutorial Misconduct

Arvin argues that certain questions posed by the prosecutor amount to misconduct. Arvin moved for a mistrial on this ground below. The district court did not find deliberate misconduct, but issued a cautionary instruction to the jury. Control of counsel at trial is a matter primarily for the district court. Cf. United States v. Guess, 745 F.2d 1286, 1288 (9th Cir. 1984) (closing arguments), cert. denied, 469 U.S. 1225 (1985). The trial court had earlier specifically permitted the prosecution to inquire into the circumstances of the mailing

until the questions would be deemed to violate Fed. R. Evid. 403. Even assuming that the questions were improper, which we do not believe to be the case, the district court gave a curative instruction which was sufficient to render any error harmless. See, Greer v. Miller, 483 U.S. 756 765-66 (1987).

V. The Propriety of the Jury Instruction

[5] Arvin argues that the trial court wrongly instructed the jury on the legal definition of "lascivious." Instructions on the elements of an offense and definitions of legal terms are reviewed de novo. United States v. Stenberg, 803 F.2d 422, 433 (9th Cir. 1986). The instructions are to be viewed as a whole, in the context of the

entire trial, to determine whether they were misleading or inadequate to guide the jury's determination. United States v. Pazsint, 703 F.2d 420, 424 (9th Cir. 1983).

The portions of the instruction relevant to this appeal are set out in the margin.[4] The instruction provides a

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[4] "[T]he elements of the offense break down into the following:

Number one is a knowing mailing. Now, in this case that's admitted, so there's...no necessity for you making a decision on that.

Second, a visual depiction. [T]he pictures in this case are obviously visual depictions.

Third, the use of a minor. You will have to decide that issue based upon your observation of the pictures themselves.

And finally, fourth element -- and the one I think that you're going to have to wrestle with in making your decision, because I think it's the key to this case -- is the lascivious exhibition of the genitals or pubic areas.

[W]hen you see the photographs, it is obvious that they do involve the genitals and pubic area. So your decision -- you must decide whether the exhibitions are lascivious, lascivious.

[T]he statute does not define...what the word "lascivious" means. But some courts have considered the subject of what lascivious means. Even those courts have not given to us a precise definition of what that word means. They have generally held that the word lascivious is virtually interchangeable with the word "lewd."

And the courts have also given us a list of factors which you, as the decision makers, can consider in deciding whether the pictures are lascivious.

...I'm going to list for you eight factors which the courts have said that you would have to decide whether these photographs were lascivious -- can consider in making that decision.

...[T]hese are the factors that you can consider in deciding whether the pictures involve the lascivious exhibition of the genitals or the pubic area:

Number one: whether the focal point of the pictures is on the child's genitals or pubic area.

Number two: whether the setting is sexually suggestive. For example, in a place or pose generally associated with a sexual activity.

Number three: whether the child is depicted in an unnatural pose, considering the age of the child.

Number four: whether the child was clothed or nude.

Number five: whether the pictures suggest sexual coyness or willingness to engage in sexual activity.

Number six: whether the pictures are intended or designed to elicit sexual response from the viewer.

Number seven: whether the picture portrays the child as a sexual object.

And number eight: [the] captions on the pictures.

[A] visual depiction need not involve all of those factors in order to be a lascivious exhibition of the genitals or pubic area, but those are the factors which you can consider. And the weight or lack of weight which you give to any one of those factors is for you to decide.

[T]hese pictures may not be found to be lascivious merely because you may not like them or because you may find them to be in bad taste.

list of eight factors which the jury "can", "would have to", or "may" consider. The jury was instructed that the depiction "need not involve all of these factors,' and "the weight or lack of weight which [the jury gives] to any one of those factors is for [it] to decide."

In formulating an instruction "sexually explicit conduct" under Section 2256(2)(E), the court of course must instruct the jury that it must find that the pictures visually depict the minor's genitals or pubic area. This is a threshold element contained in the language of Section 2256(2)(E) itself, distinct from the additional requirement that the depiction be "lascivious." In order to be lascivious, the exhibition must be pornographic, even if it need not be obscene. At the same time, it

must be recognized that the type of sexuality encountered in the pictures of children is different from that encountered in pictures of adults. This because children are not necessarily mature enough to project sexuality consciously. Where children are photographed, the sexuality of the depictions often is imposed upon them by the attitude of the viewer or photographer. The motive of the photographer in taking the pictures therefore may be a factor which informs the meaning of "lascivious."

[6] The distinction between a pornographic depiction and an innocent one is a distinction the jury should be able to make from its own experience. How much instruction should be given beyond telling the jurors that they must find the statutory imperatives and must

use their common sense to decide whether the pictures are lascivious is essentially up to the discretion of the judge. The judge in this case gave a long list of specific factors that had been present in other child pornography cases to guide the jurors' viewing. Each one could be relevant but, on the other hand, might not be relevant or significant in this particular case. The judge guarded against the jury's attaching undue significance to any particular factor by instructing that "the weight or lack of weight which you give to any one of those factors is for you to decide." Arvin would have us believe that this instruction allowed the jury to find "lasciviousness" from the mere presence of one factor only -- for example nudity or suggestive captions on the pictures. We disagree.

A reasonable juror could not have interpreted the instructions to allow a guilty verdict from the single fact that the subject was nude without more. The judge conveyed to the jury that "lascivious" was like "lewd" and that it was more than distasteful and more than bad taste. We conclude that the jury was properly instructed -- the jurors were told about as well as any jurors could be what they should consider in making a determination as to whether the pictures were lascivious. Appellate courts review jury instructions as a whole for meaning and clarity because that is how jurors view them. These instructions viewed as a whole, were proper instructions.

CONCLUSION

We hold that a depiction of a minor need not be obscene to satisfy the definition of "sexually explicit conduct" under the "lascivious exhibition of the genitals or pubic area" prong of 18 U.S.C. Section 2256(2). The district court did not err in refusing to dismiss the indictment and in refusing to grant a mistrial. Exclusion of expert testimony was not error. The jury instructions, read as a whole, properly informed the jury as to the meaning of "lascivious."

We affirm.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee v. MICHAEL ARVIN, Defendant-Appellant.	No. 87-1220 D.C.# CR. 86-0752-CAL ORDER

Before: FLETCHER, BEEZER, and O'SCANNLAIN, Circuit Judges

Appellant's petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee v. MICHAEL ARVIN, Defendant-Appellant.	No. 87-1220 D.C.# CR. 86-0752-CAL ORDER

Before: FLETCHER, Circuit Judge

Motion for stay for 30 days pursuant to F.R.A.P. 41(b) is granted.

UNITED STATES CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

FIFTH AMENDMENT

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation".

EIGHTH AMENDMENT

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

CHILD PROTECTION ACT OF 1984, P.L. 98-292

"18 U.S.C. Section 2252(a) Any person who - (1) knowingly...mails any visual depiction, if-- (A) the producing

of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct...".

"18 U.S.C. Section 2255 Definitions for chapter" "For the purposes of this chapter, the term-- (1) 'minor' means any person under the age of eighteen years; (2) 'sexually explicit conduct' means actual or simulated-- (E) lascivious exhibition of the genitals or pubic area of any person;...".

(2)

No. 90-488

In the Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL ARVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the First Amendment requires that the constitutional analysis applicable to obscene materials be applied to child pornography.

2. Whether, in this prosecution for mailing lascivious photographs of a minor in violation of 18 U.S.C. 2252(a), the district court erred in refusing to permit expert testimony on the meaning of the term "lascivious."

3. Whether the district court denied the jury sufficient guidance on the question whether the pictures depicted "a minor engaging in sexually explicit conduct."

4. Whether the district court erred when it noted that the pictures at issue in this case obviously involved the subjects' genitals and pubic area.

5. Whether the jury instructions properly informed the jury about how to determine whether the photographs were lascivious.

6. Whether petitioner's three-year sentence violates the Eighth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-488

MICHAEL ARVIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-35A) is reported at 900 F.2d 1385.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1990, and a petition for rehearing was denied on June 25, 1990. Pet. App. 36A. The petition for a writ of certiorari was filed on July 26, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on two counts of mailing photographs of minor females engaged in sexually explicit conduct, in violation of 18 U.S.C. 2252(a)(1). He was sentenced to three years' imprisonment on Count 1, to be followed by a three-year term of probation on Count 2. The court of appeals affirmed. Pet. App. 1a-35a.

1. In April and May 1986, petitioner mailed first one and then two photocopied photographs of nude young girls to undercover officer Jeffrey Miller. The mailings were in response to an advertisement placed by Miller in *Swinger's Digest* seeking a pedophile correspondent. Pet. App. 7A-8A. The photocopies were of pictures petitioner had purchased several years earlier. All three showed apparently prepubescent girls, completely nude, facing the camera with their legs apart exposing their genitals. The three pictures were captioned "Lolita-Sex," "Skoleborn-School Children," and "Little Girls F--k too." *Id.* at 8A.

2. A two-count indictment was returned on August 22, 1986, charging petitioner with violating 18 U.S.C. 2252(a). That provision prohibits the mailing of a visual depiction of a minor engaging in "sexually explicit conduct," which is defined to include the "lascivious exhibition of the genitals or pubic area." 18 U.S.C. 2256(2). The district court granted the government's motion *in limine* to exclude expert testimony on the question whether the pictures were "lascivious." Because petitioner stipulated that he knowingly mailed the photocopied photographs, the evidence at trial consisted primarily of the pictures themselves. Pet. App. 7A-9A.

The jury was instructed that the offense consisted of four elements: (1) knowing mailing (2) of a visual depiction (3) that involves the use of a minor (4) and includes the lascivious exhibition of the genitals and pubic area. Pet. App. 28A n.4.[1] The jury was told that it must decide whether the pictures were "lascivious," and that the courts have "generally held that the word lascivious is virtually interchangeable with the word 'lewd.'" *Id.* at 29A n.4. The jury also was given a list of eight factors—drawn from the case law, especially *United States* v. *Dost*, 636 F. Supp. 828, 831 (S.D. Cal. 1986), aff'd *sub nom. United States* v. *Wiegand*, 812 F.2d 1239 (9th Cir.), cert. denied, 484 U.S. 856 (1987)—to guide it in determining whether the poses were lascivious, although it was told that "the weight or lack of weight which you give to any of those factors is for you to decide." Pet. App. 29A-30A n.4.[2] Finally, the jury was cautioned that the pictures "may not be found to be lascivious merely because you may not like them or because you may find them to be in bad taste." *Id.* at 30A n.4. The jury found petitioner guilty on both counts.

3. The court of appeals affirmed petitioner's convictions. Pet. App. 1A-35A. It rejected his argu-

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[1] The relevant jury instructions are reproduced in full in footnote 4 of the court of appeals' opinion, Pet. App. 28A-30A.

[2] The factors included (1) the focal point of the picture on the genitals, (2) a sexually suggestive setting, (3) depiction of the child in an unnatural pose, (4) the dress or nudity of the child, (5) a suggestion of sexual receptiveness, (6) the intent of the pictures to elicit a sexual response from the viewer, (7) portrayal of the child as a sexual object, and (8) captions on the pictures. Pet. App. 29A-30A n.4.

ment that the indictment should have been dismissed because the pictures were not mailed for a commercial purpose, because he was not engaged in distribution, and because the pictures were not lascivious as a matter of law. The court noted that Congress had amended the statute in 1984 to eliminate the previous requirement of a commercial purpose; that any mailing is covered by the statute; and that the question whether the pictures were lascivious was properly left to the jury to decide. *Id.* at 13A-14A & n.2, 16A-18A.

The court of appeals rejected petitioner's contention that he should have been permitted to adduce expert testimony on the meaning of "lascivious," on the supposed educational uses of such photographs, and on the terms "community standards," "prurient interest" and "patent offensiveness." Pet. App. 18A-26A. Following its prior decisions in *United States* v. *Wiegand*, 812 F.2d at 1243-1244, and *United States* v. *Langford*, 802 F.2d 1176, 1179-1180 (9th Cir. 1986), cert. denied, 483 U.S. 1008 (1987), the court of appeals held that the term "lascivious" is a "commonsensical term" on which expert testimony is unnecessary and, indeed, could usurp the function of the jury. Pet. App. 21A-22A, 24A-25A. Moreover, because Congress prohibited the use of minors in the depiction of "sexually explicit conduct" even when the depictions are not "obscene" under *Miller* v. *California*, 413 U.S. 15 (1973), the court held that expert testimony regarding the terms "redeeming value," "prurient interest," and "community standards" would have been irrelevant to the jury's deliberations. Pet. App. 11A-13A, 22A-23A, 25A-26A.

Finally, the court of appeals held that the jury instructions, taken as a whole, properly guided the jury in determining whether the pictures were "las-

civious" by informing the jury that "lascivious" meant much the same thing as "lewd"; by identifying factors for the jury to consider, while at the same time instructing the jury that it must determine the weight to be given to each of the factors; and by admonishing the jury not to rely on its own feeling that the pictures were in bad taste. Pet. App. 27A-34A. In fact, the court concluded that "the jurors were told about as well as any jurors could be what they should consider in making a determination as to whether the pictures were lascivious." *Id.* at 34A.

ARGUMENT

1. Petitioner argues (Pet. 19-23) that his convictions violate the First Amendment because, in his view, a prosecution for child pornography requires consideration of "community standards," "prurient interest," and the possible "scientific and other value" of the pictures. The court of appeals correctly rejected this contention.

In *New York* v. *Ferber*, 458 U.S. 747 (1982), this Court sustained a state statute prohibiting persons from knowingly promoting sexual performances by children under the age of 16 by distributing materials depicting such performances, even though the depictions were not "obscene" under the test articulated in *Miller* v. *California*, 413 U.S. 15 (1973). *Ferber* distinguished the statutes involved in obscenity cases from a statute designed to protect children against the physical or psychological abuse entailed when they are used to create depictions of sexually explicit conduct. 458 U.S. at 753-766. The Court held that material depicting the sexual exploitation of children is not entitled to First Amendment protection in light of the compelling state interest in

protecting children from such abuse. *Id.* at 764; see also *Osborne* v. *Ohio*, 110 S. Ct. 1691, 1696-1697, 1698 (1990). Accordingly, *Ferber* held that the *Miller* obscenity test does not apply to child pornography laws in the following respects: "A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." 458 U.S. at 764.

Congress enacted 18 U.S.C. 2252 in its current form in response to *Ferber*. As the court of appeals pointed out, Pet. App. 13A-15A, Congress amended the prior version of the statute to eliminate any requirement of a commercial purpose, to raise the age of minority from 16 to 18, and to penalize the mailing of depictions consisting of the "lascivious exhibition of the genitals or pubic area." 18 U.S.C. 2256(2)(E). The last of these changes was made for the specific purpose of providing that "an exhibition of a child's genitals does not have to meet the obscenity standard to be unlawful." 130 Cong. Rec. 7196 (1984) (remarks of Sen. Specter); see Pet. App. 14A-15A. The courts of appeals have uniformly agreed that the obscenity-related inquiry into "community standards," "prurient interest," and "redeeming value" is not required by 18 U.S.C. 2252 and that the statute, as so construed, does not violate the First Amendment. See *United States* v. *Freeman*, 808 F.2d 1290, 1291-1292 (8th Cir.), cert. denied, 480 U.S. 922 (1987); *United States* v. *Wiegand*, 812 F.2d at 1243-1245; *United States* v. *Rubio*, 834 F.2d 442, 447-448, 451-452 (5th Cir. 1987); *United States* v. *Villard*, 885 F.2d 117, 121-122 (3d Cir. 1989); see also *United States* v. *Wolf*,

890 F.2d 241, 243 n.2 (10th Cir. 1989). This issue therefore does not warrant review.

2. Petitioner argues (Pet. 13-23) that he should have been permitted to adduce expert testimony on the meaning of the term "lascivious" as well as the terms "community standards," "prurient interest" and "redeeming value." Expert testimony was not required on the latter issues because, as just explained, they are not elements of the offense, as a matter either of statutory construction or constitutional law.

Moreover, Fed. R. Evid. 702 provides that if scientific, technical or other specialized knowledge will "assist the trier of fact," a witness qualified as an expert "may" testify thereto. "Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier." Advisory Committee note to Rule 702. This Court has held that a trial court has broad discretion in deciding whether to admit or exclude expert testimony. See *Hamling* v. *United States*, 418 U.S. 87, 108, 124-125 (1984); see also, *e.g.*, *United States* v. *Ladd*, 885 F.2d 954, 959 (1st Cir. 1989); *United States* v. *Tutino*, 883 F.2d 1125, 1134 (2d Cir. 1989), cert. denied, 110 S. Ct. 1139 (1990). The district court did not abuse its discretion in concluding that the jury was not in need of any expert assistance in this case. "Lascivious" has a plain English meaning, and it would have supplanted the function of the jury if an expert had purported to testify on the question whether the pictures met that definition. Compare *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35-36 (1962).

3. Also without merit is petitioner's argument (Pet. 14-19, 24-25) that the district court's jury instructions and its exclusion of expert testimony de-

prived the jury of guidance on an essential element of the offense—namely, that the pictures depicted "a minor engaging in sexually explicit conduct." The statute punishes "[a]ny person who * * * knowingly * * * mails, any visual depiction, if (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct * * *." 18 U.S.C. 2252(a)(1). "[S]exually explicit conduct" is defined to include, *inter alia*, "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2). The jury was instructed that it must find that each of the pictures showed "the use of a minor" and "the lascivious exhibition of the genitals or pubic areas." Pet. App. 28A n.4. The instructions thus incorporated the statutory definition of the phrase "sexually explicit conduct" in explaining the statutory element that the minor be depicted "engaging in sexually explicit conduct." The instructions therefore required the jury to find that the pictures showed a minor engaging in such conduct. And for the reasons stated in point 2, *supra*, expert testimony was not needed on that issue.

4. Petitioner next argues (Pet. 25-29) that the jury instructions improperly shifted the burden of proof on an element of the offense. The burden-shifting occurred, he argues, because in stating that the pictures must show "lascivious exhibition of the genitals or pubic area," the district court commented: "[w]hen you see the photographs, it is obvious that they do involve the genitals and pubic area." Petitioner concedes (Pet. 28) that he failed to object to this statement at trial, and it therefore could furnish the basis for reversal only if it constituted plain error. Fed. R. Crim. P. 52(b). The

court's observation clearly did not rise to that level, since that aspect of the case was not in dispute: petitioner admitted mailing the pictures, which were admitted into evidence and spoke for themselves, and no juror examining the pictures could possibly have failed to notice that they showed the genitals or pubic area. It was left to the jury, of course, to determine the only disputed question: whether the pictures were lascivious.

5. Petitioner next argues (Pet. 29-34) that the jury instructions failed to furnish sufficient guidance on whether the pictures were lascivious. Specifically, he argues that the instructions improperly allowed the jury to conclude that the pictures were lascivious simply because one of the listed factors—for example, nudity—was present. Petitioner ignores the import of the instructions as a whole. The jury was instructed that it must find the pictures to be lascivious and that courts have regarded that term as essentially synonymous with "lewd"; it was given eight factors, drawn from *United States* v. *Dost*, *supra*, and approved by other courts, to consider; and it was admonished that "the weight or lack of weight which you give to any one of those factors is for you to decide." Pet. App. 30A n.4. Taken as a whole, *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973), the instructions were proper, and they have been followed by other courts. See *United States* v. *Wolf*, 890 F.2d at 244-247; *United States* v. *Villard*, 885 F.2d at 122; cf. *United States* v. *Nolan*, 818 F.2d 1015, 1019 n.5 (1st Cir. 1987) (reciting *Dost* factors).

6. Finally, petitioner argues (Pet. 35-43) that his sentence of three years' imprisonment violates the Eighth Amendment because it is disproportionate to his offense. Although petitioner raised this issue below (see C.A. Br. 30-33), the court of appeals

found it unnecessary to address it. Petitioner's argument is, in any event, without merit.

In *Solem* v. *Helm*, 463 U.S. 277 (1983), upon which petitioner relies, the Court held that a life sentence without possibility of parole for the offense of uttering a "no account" check for $100 violated the Eighth Amendment. The Court stressed, however, that a sentence may be set aside under the Eighth Amendment only if it is "significantly disproportionate" to the crime, *id.* at 303, and it observed that successful challenges to the proportionality of particular sentences will be "exceedingly rare." *Id.* at 290 n.16. The Court also furnished some guidance for evaluating such claims, explaining that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 292.

Petitioner concedes (Pet. 39) that his offense is a "serious crime." Moreover, his three-year sentence is wholly different from the life sentence without possibility of parole at issue in *Solem* v. *Helm*. It also is well within the statutory maximum penalty of ten years, which manifests the seriousness with which Congress regards an offense that involves the sexual exploitation of children, and reflects what this Court has recognized to be the compelling public interest in preventing such exploitation and continuing trade in the products of such exploitation. *Osborne* v. *Ohio*, 110 S. Ct. at 1695-1697; *Ferber*, 458 U.S. at 756-762. Finally, petitioner's sentence corresponds to the sentence of 3.1 years that one court characterized as

the national average of pre-guideline sentences for all offenses under Section 2252. See *United States* v. *Freeman*, 663 F. Supp. 73, 74 (E.D. Ark. 1987).[3] For the foregoing reasons, this case does not remotely resemble one of those "exceedingly rare" cases in which the sentence is so grossly disproportionate to the offense as to violate the Eighth Amendment under the framework of *Solem* v. *Helm*.[4]

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[3] Although petitioner cites (Pet. 40-41) one case in which the defendant received a suspended sentence for violating Section 2252, far more than one case in which a lesser sentence was imposed would be necessary to establish an Eighth Amendment violation. There are, moreover, other cases in which more severe sentences have been sustained. See, *e.g.*, *United States* v. *Andersson*, 803 F.2d 903 (7th Cir. 1986) (12 years' imprisonment, although conduct was more serious), cert. denied, 479 U.S. 1069 (1987).

Under the Sentencing Guidelines, the base offense level for any violation of Section 2252 is 13, with a two-level enhancement when the offense involves a picture of a prepubescent minor, as in this case. Sentencing Guidelines 2G2.2(a), (b)(1). The sentencing range for base offense level 15, for the lowest criminal history category, is 18-24 months' nonparolable imprisonment. Sentencing Guidelines § 5A (Table). Petitioner's sentence of three years' imprisonment, for which he will be eligible for parole after serving 12 months, less goodtime credits (see 18 U.S.C. 4205 (1982)), is likely to be even less severe than the Guideline sentence that would have applied if his offense had occurred after November 1, 1987.

[4] Because this case does not begin to approach the sort of disproportionality necessary to state an Eighth Amendment violation, there is no need to hold the petition in this case pending the disposition of *Harmelin* v. *Michigan*, petition for cert. granted, No. 89-7272 (argued Nov. 5, 1990). *Harmelin*, like *Solem* v. *Helm*, involves a life sentence without possibility of parole, a sentence wholly different from the three-year term petitioner received.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

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IN THE

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER IN RESPONSE TO OPPOSITION BRIEF OF UNITED STATES

Law Offices Of
CHARLES R. GARRY
By CHARLES R. GARRY
1256 Market Street
San Francisco, CA 94102
(415) 864-3131

Attorney for Petitioner
MICHAEL ARVIN

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Ferber-Related Analysis

The government argues that an obscenity-related inquiry into "community standards," "prurient interest," and "significant value" is not required and

is not supported by an Appeals Court opinion. This is misleading as to petitioner's actual arguments and is inaccurate as to the common law.

Petitioner Arvin has not argued for an obscenity-related inquiry but rather he has asked for his right to submit evidence in accord with the Ferber analysis. Pet 19-23. The Ninth Circuit in Wiegand stated that terms such as "lewd" and "lascivious" are deeply rooted in "community standards." The court went on to agree that these terms are the result of norms which do vary over time and space with "the law's embodiment in the contemporary customs and conventions of a community. . ." United States v. Wiegand, 812 F.2d 1239, 1244 (9th Cir.), cert. denied, 484 U.S. 856 (1987).

Expert Testimony

The government argues the propriety of adducing expert testimony is to be determined by the assistance it will provide to the trier of fact. G.B. 7. In citing Hamling v. United States, 418 U.S. 87 (1984), et al., the government attempts to foreclose petitioner's claim that the District Court was in error in excluding expert testimony.

Hamling says in part, "[a]s we have noted, infra, at 124-125, the District Court has wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." Id. at 108.

But Hamling is a double-edged sword. For though it straps petitioner to "the laboring oar in showing that such rulings constitute reversible error" (id. at

124), it also provides petitioner with his argument of the propriety of the expert testimony.

In Hamling, "the District Court permitted four expert witnesses called by petitioners to testify extensively concerning relevant community standards." Id. at 125.

The Court of Appeals in the Hamling case had concluded that the District Court's exclusion of comparable material was correct and "that any abuse of discretion in refusing to admit the materials themselves had been 'cured by the District Court's offer to entertain expert testimony . . . ." Id. at 125, quoting 481 F.2d at 320.

In the instant case, petitioner's offer of comparable materials was rejected without the curative offer to entertain any expert testimony. And as

has been previously established, petitioner was also denied competent testimony as to the essential element of "engaging in." Here petitioner was given no latitude in rebutting factual issues and no opportunity of "contradiction by countervailing evidence." Id. at 110 n.11.

Even the government has conceded that "the statutory element that the minor be depicted 'engaging in sexually explicit conduct' . . . required the jury to find that the pictures showed a minor engaging in such conduct." G.B. 8. As petitioner was able to raise a prima facie showing as to materiality of at least this issue, Hamling underscores petitioner's right to expert testimony. "The defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an oppor-

tunity to adduce relevant, competent evidence bearing on the issues to be tried." Id. at 125.

Jury Instructions

The District Court instructed the jury that the offense consisted of four elements: (1) a knowing mailing; (2) a visual depiction; (3) the use of a minor; and (4) lascivious exhibition of the genitals or pubic area. Pet. App. 28A n.4. Only one of these elements, i.e., the use of a minor, was left solely for the jury to decide. Jury deliberation upon each of the other three elements was at least in part usurped by the District Court. Pet. App. 28A-29A.

The District Court informed the jury that as the mailing was admitted, "there's . . . no necessity for you to

make a decision on that."[1] Ibid.

As to the visual depiction, the District Court told the jury, "[t]he pictures in this case are obviously visual depictions." Ibid.

The fourth element, the lascivious exhibition of the genitals, was divided as to presumptiveness. The jury was told it was obvious that these pictures involved the genitals and pubic area, but that the jury would have to wrestle with whether in fact the exhibitions were lascivious or not. Ibid.

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[1] Petitioner concedes that this instruction, as to knowing mailing, was harmless error. It was ". . . an instruction establishing a conclusive presumption with regard to an element of the crime that the defendant in any case admitted." Carella v. California, 488 U.S. ___, ___ (1989), Scalia, J. concurring and citing Connecticut v. Johnson, 460 U.S. 73, 87 (1983) (plurality opinion).

The basis of the government's argument is that this type of error does not rise to the level of plain error. G.B. 8-9. It claims that these were not issues in dispute;[2] that petitioner had admitted the mailing; that the evidence was admitted; that the evidence spoke for itself; and that no jury examining the pictures could have concluded otherwise. Ibid.

The government argued that at any rate the question of lasciviousness, being the only issue in dispute, was left to the jury to decide. Ibid. However, the District Court's prior presumptions as to the elements, particularly the fourth, tainted the factors to be used in

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[2] Not only had petitioner disputed the genital exhibition element, but he had planned to introduce expert testimony and evidence as to this issue. Pet. 13-23.

determining lasciviousness. The District Court told the jury that "when you see the photographs, it is obvious that they do involve the genitals and pubic area." Pet. App. 28A-29A. This instruction was a conclusive presumption. A reasonable juror would have interpreted this as a mandatory inference to be drawn when considering the first of the eight lasciviousness factors, i.e., "whether the focal point of the pictures is on the child's genitals or pubic area." Ibid.

The District Court's observation here did amount to plain error. It has been shown, supra, that it played a role in influencing the jury's deliberation as to lasciviousness and therefore as to its verdict.

As this Court has pointed out in Cupp, "the question is not whether the trial court failed to isolate and cure a

particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughton, 414 U.S. 141, 147 (1973).

Conclusion

For all of the reasons stated above, as well as those set forth in the Petition for Writ of Certiorari, it is respectfully asked that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Ninth Circuit.

Respectfully submitted,

LAW OFFICES OF CHARLES R. GARRY

CHARLES R. GARRY